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No. 99-

IN THE

Supreme Court of the United States

RAYMOND F. MENDEZ,

Petitioner,

v.

COMMERCIAL CREDIT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RAYMOND F. MENDEZ
Petitioner, Pro Se
104 Calle Paula
Santa Fe, NM 87505
(505) 982-3706
(505) 820-0162

155841

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether a fair and impartial hearing was held in the arbitration hearing. I contend that I was not able to present my case to the arbitrators.

2. Whether the testimony of Commercial Credit Corporation's senior VP, who had already lied to the EEOC; had withheld crucial evidence (possibly because that evidence was destroyed); had doctored evidence; had forged another younger manager's signature to a performance evaluation and attempted to produce this forged evidence at the arbitration hearing; and perjured himself again during the arbitration hearing is grounds for vacating the arbitration award. The arbitrators found his testimony: "very credible".

3. Whether the Court of Appeals can ignore the testimony of my former supervisor who testified that he was forced to give me an unsatisfactory performance evaluation because he feared for his job. He further confirmed Commercial Credit Corporation's corrupt activities. My performance evaluation was procured by fraudulent means. Discovery of fraud could not result in discovery prior to arbitration. The arbitrators ruled that I presented no evidence that Commercial Credit's determination that my performance evaluation of "needs improvement" was false.

4. Whether the Court of Appeals can ignore the testimony of Bill Stroupe (an older manager who was forced to resign at the same time). His testimony confirms that Commercial Credit's senior VP lied and withheld crucial evidence which had been requested by my attorney. He had already lied to the EEOC. We had this proof but my attorney did not bring this matter up at the arbitration hearing.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Commercial Credit Corporation, is a wholly-owned subsidiary of Commercial Credit Company. Commercial Credit Company is a wholly-owned subsidiary of CC Holdings, Inc. CC Holdings, Inc. is a wholly-owned subsidiary of CitiGroup, Inc. CitiGroup, Inc. is a publicly held company, the shares of which are traded on the New York Stock Exchange. There are no publicly-traded companies that own 10% or more of CitiGroup, Inc.'s Common Voting Stock. Warren Buffet Company owns 100% of the CitiGroup, Inc.'s Series I Preferred Stock.

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Petitioner, Raymond F. Mendez, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported but can be found at App. A. The opinion of the District Court of New Mexico is also unpublished and can be found at App. B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 16, 1999. The Court of Appeals denied a timely petition for rehearing on September 16, 1999 (App. D).

This jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A. The Proceedings Below

The fundamental questions in this case is whether a litigant is entitled to relief from a judgment if the Appeals Court 1. ignored facts that Petitioner did not receive a fair arbitration hearing; 2. ignored Petitioner's proof that Commercial Credit Corporation's ("CCC") senior VP lied to the arbitrators and had withheld crucial evidence; had doctored evidence; had forged another younger manager's signature to a performance evaluation and attempted to produce this forged evidence at the arbitration hearing and perjured himself again during the arbitration hearing. The arbitrators were greatly influenced by him and found his testimony "very credible"; 3. ignored the deposition of my former supervisor who testified that he was forced to give me an unsatisfactory performance evaluation since he feared for his job. The arbitrators ruled that I presented no evidence that Commercial Credit Corporation's determination that my performance evaluation of "needs improvement" was false; 4. ignored the deposition of Bill Stroupe (an older manager who was forced to resign at the same time). He testified and confirmed that Commercial Credit Corporation's senior VP did indeed lie and withheld crucial evidence — his own unsatisfactory performance evaluation for one.

The intent of arbitration is to hold a fair and impartial hearing. I was not able to present my case to the arbitrators. Whenever the arbitrators asked me questions and I started to bring up facts, CCC's attorney immediately objected. Since my own attorney failed to counter the objections, the arbitrators should have allowed me to continue. My attorney knew that I was upset and took me out of the hearing room

and basically told me to only answer "yes" or "no" to questions. I seriously considered walking out of the hearing altogether. When CCC's attorney objected to the written notarized statements of my witnesses because he had not had an opportunity to cross examine, the arbitrators should have afforded me with a postponement and to request a continuance for the witness' presence. One of my witness' testimony was very critical since he elaborated on the Retaliation issue. Respondent's attorney prevented me from presenting my case. The arbitrators never found out that my younger female assistant succeeded me as manager (her personnel record was withdrawn from evidence list — I was not aware of this until after arbitration); that CCC had failed to produce her time sheets to the EEOC and to my attorney because she was already enjoying special favors by not having to document time off from work (CCC and the courts have questioned the significance of her time sheets and overtime records. My claim was an Age Discrimination case. CCC, upon my notice of resignation, granted her vacation time off before I left the company. She had told me then that CCC had promised her that she did not have to report the time off when I requested her time sheet. If the vacation time off was not documented, she would have also received overtime pay for this period. She was not an exempt employee. Another reason CCC withheld this time sheet to the EEOC and to my attorney is because I had refused to sign the time sheet and they possibly forged my signature to it); that Bill Stroupe's younger female assistant also succeeded him as manager when he was forced to resign the same time; that CCC had manipulated reports to make a younger manager as top manager in our peer group and was shortly thereafter promoted to district manager when I, in fact, should have won the award; and that CCC had withheld evidence and doctored evidence.

The Court of Appeals had Larry Falin's (my former supervisor) deposition where he testified that he was forced to give me an unsatisfactory performance evaluation. Since he feared for his job, he did not refuse his own supervisor's request. He also testified that his boss, Dave Roberts, took over supervision of *my branch* shortly after he had given me the evaluation. This deposition was obtained after arbitration. My attorney had informed me prior to arbitration that CCC's attorney was going to depose him so she concentrated on other witnesses and deposed three of them and one other avoided her. I do not know what went on between CCC's attorney and my attorney that CCC decided not to depose Mr. Falin. In my deposition of Mr. Falin, he stated that CCC's attorney had indeed contacted him prior to arbitration apparently to depose him as a friendly witness but CCC's attorney backed off when he learned that Mr. Falin was going to tell the truth. CCC has also argued that we knew Jerry Gildea was going to testify telephonically and we could have subpoened him to testify in person. Whatever method Gildea testified, we would have expected him to testify truthfully and any amount of cross-examination would not have disclosed perjury until after arbitration. I had no idea what information Mr. Falin could provide us until I contacted him after arbitration (I no longer had legal representation). He voluntarily informed me that he had been forced to give me an unsatisfactory evaluation by Dave Roberts. He said that Roberts knew I was a very proud man and that the false performance evaluation would rattle me. In his testimony, he identifies corrupt activity by CCC's higher echelon. Due diligence on my part could not have resulted in discovery of the fraud prior to arbitration. I also wanted to depose the president of CCC to see whether he embraced the corruption going on. He had to know that his company had furnished the EEOC bogus evidence and withheld other evidence.

He had to know that his company had manipulated reports, withheld evidence (possibly destroyed) when my attorney requested it, forged evidence, and especially that one of his senior VP's had lied. The U.S. District Court did not grant my request to depose him.

The Court of Appeals and the arbitrators had Bill Stroupe's deposition obtained prior to arbitration. He confirmed that CCC's senior VP had lied and had withheld crucial evidence — his own unsatisfactory performance evaluation. When CCC's attorney questioned him during the deposition, he found out that Bill had "dumped" all of the caustic faxes that were sent to him by his supervisor. Since Bill had moved to North Carolina and then to Tennessee from New Mexico after being forced to resign and he did not know if he still had his performance evaluation, CCC's attorney advised CCC to deny its existence and consequently it was never produced. This evidence was important to CCC since Bill also was forced to resign at the same time and they did not want to disclose the same pattern which they were notoriously known for in discriminating against the older employees.

B. Background of the 1998 Judgment

On June 19, 1996, Petitioner filed complaint in the United States District Court for the District of New Mexico (Civil Case No. CIV 96-0876 JP/JHG) against Commercial Credit Corporation ("CCC"), Respondent, for Age Discrimination, and for Retaliation for filing a charge with the EEOC after Petitioner found new employment.

Petitioner was employed in the finance industry since 1966. Originally employed with SIC Finance, the company

was acquired by Barclays American/Financial. CCC acquired Barclays in 1990. On July, 1994 CCC forced my resignation. I was 51 years old at the time. I was replaced by my 29 year old assistant female manager.

On February 13, 1997 an agreement was reached to dismiss with prejudice my federal court lawsuit and pending EEOC charge (or any other pending administrative actions) and proceed to arbitration of the claims in the lawsuit and the pending EEOC charge pursuant to and in accordance with CCC's arbitration policy even though I had not signed an arbitration agreement when CCC acquired my former employer in 1990. On February 14, 1997, Stipulated Dismissal of above civil case was filed. On September 29, 1997, CCC filed Motion to Dismiss to American Arbitration Association (Case No. 76-160-0093-97). On October 22, 1997, my attorney responded to American Arbitration Association that I had to pay additional attorney's fees to counter CCC's motions and that I was entitled to one free day of arbitration. The presiding arbitrator denied CCC's Motion to Dismiss on October 28, 1997. On December 11, 1997, an Arbitration Hearing was held in Santa Fe, New Mexico. On January 9, 1998, the presiding arbitrator denied any award.

On February 13, 1998 the American Arbitration Association denied my Motion for Reconsideration. On March 3, 1998, Petitioner filed with the First Judicial District Court, County of Santa Fe, State of New Mexico (Case No. SF-98-523) Petition and Motion to Vacate Arbitration Decision. On March 25, 1998 CCC filed Notice of Removal in the U.S. District Court for the District of New Mexico and action was subsequently removed from state court to federal court. On October 30, 1998 the U.S. District Court

for the District of New Mexico dismissed with prejudice court case No. CIV 98-0358 MV/LFG and entered judgment in favor of CCC.

On November 24, 1998 Petitioner filed Notice of Appeal in the United States Court of Appeals for the Tenth Circuit. On August 16, 1999 the Appeals Court issued Order and Judgment denying the appeal. On September 16, 1999 the Appeals Court denied a petition for rehearing which was timely filed.

In the arbitrators' award memo, they gave credence to the testimony of Jerry Gildea, CCC's senior VP. Prior to the arbitration hearing, my attorney had requested certain evidence. Gildea's office produced a performance evaluation of a younger female manager which had been doctored to appear that it was also a "needs improvement" evaluation. The signature, as I found out later after the hearing, had been forged. After we discovered Gildea's attempt to deceive us, he concocted other reasons why other young managers received satisfactory performance evaluations. For example, in the case of Wanda Shockey, the arbitrators wrote in part: . . . "Mr. Jerry Gildea testified credibly that her situation was not comparable because she spent a substantial part of 1993 on short-term disability." Wanda Shockey was not on short-term disability for a substantial part of 1993. She was off from 2-14-94 through 4-1-94 (performance evaluation period) for a total of 46 days. In the performance evaluation of Kathy Smith, the arbitrators wrote in part: . . . "Mr. Gildea testified that Kathy Smith's situation was not comparable because the branch was located near the border between New Mexico and Texas and that she was deprived of the opportunity to loan in Texas for a substantial part of 1993". Kathy Smith's sworn statement, obtained after the hearing,

reflects that she was allowed to make loans in New Mexico to Texas residents; however, the interest rates of Texas prevailed in lieu of the New Mexico rates. She further noted that unusually high bankruptcy losses in 1993 greatly affected her branch profits. She also stated that her performance evaluation was "meets expectations" but found out that a second evaluation was submitted showing "needs improvement" with her signature forged. The arbitrators had all performance evaluations and Kathy's showed her supervisor's comments regarding the bankruptcy losses. They also had Wanda's evaluation indicating the period she was on short-term disability. Regarding Jim Byrd's performance evaluation, the arbitrators accepted Gildea's testimony that Jim's situation was different since he had only managed the branch for a short while. While Jim's tenure as manager was correct, CCC would never excuse any manager for this reason and again Gildea lied as to why this office was granted an exception. Jim had been an assistant manager in other offices (including my Barclays office) — any assistant of mine would have been well qualified to run a branch with my training methods. Jim's office was experiencing the same loss of real estate receivables (as my office was) to the competition that was offering interest rates half of what CCC was charging. Jim's supervisor alerts CCC that Jim is a "young manager" (emphasis added) by stating it at least twice on his performance evaluation. It is very clear that CCC was guilty also of a cover-up. Bill Stroupe and I did not receive any consideration whatsoever in our evaluations. It was CCC's method to force the older managers to resign. The arbitrators finally wrote: "We find Mr. Gildea's testimony in this regard very credible" (emphasis added). All of the younger managers, by receiving satisfactory evaluations, received salary increases also.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE STATUTORY OR JUDICIALLY CREATED GROUNDS TO VACATE THE ARBITRATION AWARD WAS NOT PRESENT.

It is very clear that the arbitrators were influenced by the testimony of Jerry Gildea, Commercial Credit Corporation's senior VP who testified telephonically. Commercial Credit's attorney has attempted to find legal excuses for Gildea's obvious perjured testimony. The simple fact is that he lied and the arbitrators accepted his testimony as "very credible." This was not the first time that he had lied. When I had legal representation, he lied to my attorney then that certain evidence did not exist. He went at length to produce a forged document. He had already lied to the EEOC when they also requested certain documents and he produced a bogus one. Unfortunately, my attorney did not bring all the wrong-doings at the arbitration hearing. His reasons for granting exceptions to younger managers' performance evaluations were invented as soon as we found out what he was attempting to do. The arbitrators had in their possession all of the documents that he was referring to and if they had really reviewed them, they would not have found his testimony so very credible.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONTRADICTS WITH THIS COURT'S PRIOR RULINGS THAT PLAINTIFF DID NOT ALLEGE THAT THE ARBITRATORS OR DEFENDANT PREVENTED HIM FROM PRESENTING HIS CASE.

Prior to arbitration, my attorney had advised me to tell the arbitrators anything and everything pertinent to the age discrimination and retaliation claims. As soon as I began to bring up facts, Commercial Credit's attorney immediately objected. My attorney seeing that I was visibly upset took me out of the hearing room and basically told me to only answer "yes" or "no" to questions. I felt like leaving the hearing. Since my own attorney did not counter the respondent attorney's objections, the arbitrators should have allowed me to continue. Commercial Credit's arbitration policy allowed notarized witness statements supposedly in the interest of expense. When respondent's attorney objected to them because he had not had a chance to cross-examine them, the arbitrators should have afforded me with a postponement and to request a continuance for the witness' presence. One of my witness' testimony was very critical since he elaborated on the retaliation claim.

III. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONTRADICTS THIS COURT'S PRIOR RULINGS THAT PLAINTIFF HAS FAILED TO DEMONSTRATE CORRUPTION, FRAUD, UNDUE MEANS, OR THAT THE ARBITRATORS EXCEEDED THEIR POWERS.

The Court of Appeals had Larry Falin's (my former supervisor) deposition. He testified that he was forced to give me an unsatisfactory performance evaluation. The deposition, which was taken after arbitration, was granted by the United States District Court for the State of New Mexico. Prior to arbitration, my attorney had informed me that respondent's attorney was going to depose Mr. Falin. She concentrated on deposing some of my other witnesses. I had no idea then what information Mr. Falin had that would help our cause. I had no clue what went on between respondent's attorney and my attorney but Mr. Falin was not deposed. After arbitration, discovering that Gildea had lied, I personally attempted to appeal the arbitrators' award. I no longer had legal representation. When I called Mr. Falin informing him that I was considering deposing him, he voluntarily informed me that he had been forced by his boss, Dave Roberts, to give me the unsatisfactory evaluation. He said that Roberts knew I was a very proud man and that the false performance evaluation would rattle me. In his deposition he identifies corrupt activity by Commercial Credit's higher echelon. Due diligence on my part could not have resulted in discovery of the fraud prior to arbitration. The U.S. District Court did not grant my request to depose the president of Commercial Credit. He had to know that his company had furnished the EEOC bogus evidence and withheld other evidence. He had to know that his company had manipulated reports and made a much younger manager

the winner in my peer group yearly bonus contest when I should have been the winner. (This same manager was shortly thereafter promoted to district manager). He had to know that his company withheld evidence, possibly destroyed evidence, and produced forged evidence. Finally, he had to know that one of his senior VP's was engaged in corrupt activity. In March, 1996 when my case was with the EEOC, I wrote a letter to Sandy Weill, former CEO of Travelers (CCC was wholly owned by them), informing him of CCC's refusal to provide EEOC with requested documents. My letter was referred back to the office of Jerry Gildea — Mr. Weill possibly never received it. He is now CEO of Citigroup, Inc. (CCC is a wholly-owned subsidiary of Citigroup, Inc.). Mr. Weill possibly never found out CCC's corrupt activity including the president's improper conduct.

The Court of Appeals and the arbitrators had Bill Stroupe's deposition obtained prior to arbitration. He confirmed Commercial Credit's senior VP had lied and had withheld crucial evidence — his own unsatisfactory performance evaluation. After respondent's attorney questioned him during his deposition, he found out that he had moved to North Carolina and again to Tennessee from New Mexico and he had no idea if he still had his performance evaluation. When he stated that he had "dumped" all of the caustic faxes that were sent to him by his supervisor, respondent's attorney advised them to deny its existence. Mr. Stroupe was forced to resign the same time. He was an older manager who had been in the finance industry for many years. He had always been an excellent manager and had received several awards also. He was also replaced by his younger female assistant. The Court of Appeals and arbitrators ignored his testimony. Mr. Stroupe confirms Commercial Credit's lies. His own supervisor, Larry Falin, testified that he had done a performance evaluation on him.

CONCLUSION

This case presents some questions of exceptional importance — whether a fair and impartial arbitration hearing was held; whether there was evident partiality in the arbitrators' decision to accept respondent's senior VP's testimony as very credible when evidence pointed otherwise; whether the arbitrators were guilty of misconduct in not allowing to hear evidence or to afford a postponement and a continuance to allow my witness' presence; whether the courts can ignore the testimony of my former supervisor who testified that my performance evaluation was procured by fraudulent means; and whether the courts and arbitrators can ignore the testimony of Bill Stroupe who confirms respondent's senior VP did lie and withheld evidence.

Accordingly, Raymond F. Mendez respectfully requests that my petition for writ of certiorari be granted.

Respectfully submitted,

RAYMOND F. MENDEZ
Petitioner, Pro Se
104 Calle Paula
Santa Fe, NM 87505
(505) 982-3706
(505) 820-0162

APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED AUGUST 16, 1999

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-2323
(D.C. No. CIV-98-358-MV)
(D. N.M.)

RAYMOND F. MENDEZ,

Plaintiff-Appellant,

v.

COMMERCIAL CREDIT CORPORATION,

Defendant-Appellee.

ORDER AND JUDGMENT*

Before **PORFILIO**, **BARRETT**, and **HENRY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Raymond F. Mendez, proceeding pro se, appeals the district court's order denying his request to set aside the arbitration award entered in favor of defendant Commercial Credit Corporation on his claims of age discrimination and retaliation. Plaintiff filed his action to set aside the arbitration award in a New Mexico state court. Defendant removed the action to the United States District Court for the District of New Mexico. We have jurisdiction over this diversity action under 28 U.S.C. §§ 1332(a), 1291 and we affirm.

Following the termination of his employment with defendant, plaintiff filed suit claiming he was discharged unlawfully on the basis of age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (ADEA). He also alleged defendant retaliated against him for exercising his rights under the ADEA. Plaintiff then dismissed his lawsuit and the parties proceeded before a three-member arbitration panel pursuant to defendant's written employment arbitration policy. *See* R. doc. 22, ex. A. At the conclusion of the arbitration hearing, at which both parties were represented by counsel, the arbitrators issued their award denying plaintiff's claims. *See, e.g., id.*, doc. 1, ex. C. Dissatisfied with that outcome, plaintiff sought to vacate the arbitration award. The district court granted summary judgment in favor of defendant.

"Our review of the district court's ruling is plenary, and we utilize the same standard that the district court was required to apply." *NCR Corp., E & M-Wichita v. International Ass'n of Machinists & Aerospace Workers,*

Dist. Lodge No. 70, 906 F.2d 1499, 1500 (10th Cir. 1990). Although we do not defer to the district court's decision to deny a motion to vacate an award, "maximum deference is owed to the arbitrator[s'] decision." *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995). The courts must "give considerable leeway to the arbitrator[s], setting aside [their] decision only in certain narrow circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). The arbitrators' decision may be set aside only for reasons stated in the Federal Arbitration Act, 9 U.S.C. § 10, or for a small number of reasons created by the courts, including awards which violate public policy, awards based on a manifest disregard of the law, or where the arbitrators failed to conduct a fundamentally fair hearing. *See Denver & Rio Grande W. R.R. Co. v. Union Pac. R.R. Co.*, 119 F.3d 847, 849 (10th Cir. 1997) (collecting cases). The Federal Arbitration Act provides that an award may be set aside if the "award was procured by corruption, fraud, or undue means[,] . . . there was evident partiality or corruption in the arbitrators[,] . . . the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear [pertinent and material] evidence[,]" or for other misbehavior that prejudiced any party. 9 U.S.C. § 10(a). Unless these limited circumstances are present, the arbitration award must be affirmed, even if the arbitrators erred in their factual findings or interpretation of the law. *See Denver & Rio Grande W. R.R. Co.*, 119 F.3d at 849.

On appeal, plaintiff argues that the arbitrators' decision must be set aside because Jerry Gildea, one of defendant's witnesses, lied about whether a performance evaluation was performed for Bill Stroupe and about the length of time Wanda Shockey was on disability leave; defendant forged a

personnel evaluation showing "needs improvement" for Kathy Smith; plaintiff was not allowed to state his case to the arbitrators; and the arbitrators refused to consider signed statements from four of plaintiff's witnesses. Plaintiff makes additional arguments addressed to the underlying age discrimination and retaliation claims, but we are concerned only with whether there are grounds to set aside the arbitration award, so we do not consider the merits of the underlying claims. *See W.R. Grace & Co. v. Local Union No. 759*, 461 U.S. 757, 764 (1983) ("[A] federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one.").

A review of the record on appeal confirms that none of the statutory or judicially created grounds to vacate the arbitration award are present. The evidence regarding other employees and their evaluations was available to plaintiff at the time of the arbitration. His decision not to present the evidence, or the arbitrators' decision not to credit it, does not demonstrate any of the grounds to set aside the award. *Cf. Foster v. Turley*, 808 F.2d 38, 42 (10th Cir. 1986) (party alleging fraud "must show that due diligence could not have resulted in discovery of the fraud prior to arbitration").

Plaintiff's claim that he was not allowed to state his case to the arbitrators is based on his own attorney's instruction to answer questions "yes" or "no" after he became upset at the hearing. Plaintiff does not allege that the arbitrators or defendant prevented him from presenting his case. Accordingly, he has failed to demonstrate corruption, fraud, undue means, or that the arbitrators exceeded their powers. *See* 9 U.S.C. § 10(a).

Plaintiff also asserts that the arbitrators refused to consider sworn statements, even though the arbitration policy permitted them. The policy provided that the arbitrators "may receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as [they] deem[ ] it entitled to after consideration of any objection made to its admission." R. doc. 22, ex. A, at 6. Defendant objected to the sworn statements because it had not had an opportunity to cross-examine the witnesses. Plaintiff did not subpoena the witnesses or request a continuance to obtain their presence at the arbitration hearing. The arbitrators' decision not to receive the sworn statements was within the terms of the arbitration agreement and will not be disturbed. *See Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1013 (10th Cir. 1994) (evidentiary rulings within the arbitration proceedings governed by arbitration agreement).

Plaintiff also alleges that defendant intimidated witnesses and hid or destroyed documents. Those conclusory allegations are not supported by evidence and therefore are insufficient to resist summary judgment. *See Kidd v. Taos Ski Valley, Inc.*, 88 F.3d 848, 853 (10th Cir. 1996).

The judgment of the United States District Court for the District of New Mexico is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

John C. Porfilio
Circuit Judge

APPENDIX B — MEMORANDUM OPINION AND ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO DATED AND FILED OCTOBER 30, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 98-0358 MV/LFG

RAYMOND F. MENDEZ,

Applicant,

v.

COMMERCIAL CREDIT CORPORATION,

Respondent.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Respondent's Motion for Summary Judgment, filed September 1, 1998 **[Doc. No. 21]** and on Applicant's uncaptioned pleading **[Doc. No. 17]**, docketed as an amended complaint and interpreted by Respondent as a motion for summary judgment. The Court, having considered the parties' pleadings, the relevant law, and being otherwise fully informed, finds that Respondent's Motion for Summary Judgment is well-taken and will be **GRANTED**.

Appendix B

BACKGROUND

Applicant, Raymond F. Mendez ("Mendez"), proceeding *pro se*, seeks to set aside an arbitration award in favor of his former employer, Respondent Commercial Credit Corporation ("Commercial Credit") regarding his claim of age discrimination. The gravamen of Mendez's underlying discrimination claim is his assertion that Commercial Credit gave him a "needs improvement" rating on an evaluation in an effort to create a pretext to terminate him, forced him to resign, and then filled his position with a younger, female employee.

The parties agree that the following are the uncontested material facts:[1]

1. On June 19, 1996, Mendez filed an action in the United States District Court for the District of New Mexico alleging that Commercial Credit discriminated against him on the basis of age, retaliated against him and ultimately forced him to resign.

2. Mendez subsequently agreed to dismiss the case and proceed to arbitration. The parties agreed that the arbitration would proceed according to Commercial Credit's Arbitration Policy, in effect at the time of Mendez's resignation. The parties subsequently submitted a stipulation of dismissal in the original federal suit on February 14, 1996.

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1. In his pleadings, Mendez raises numerous factual issues which are irrelevant to his claim. The Court will here recite only the relevant and material facts.

3. The Arbitration Policy permitted Mendez to conduct discovery prior to the hearing. Mendez, through his attorney, did in fact request and receive documents from Commercial Credit and did in fact take depositions.

4. Mendez and his attorney chose not to depose Ken Harrigan, Larry Falin and Jerry Gildea prior to the hearing. Mendez understood that the arbitrators could have subpoenaed these witnesses, or any others, to a deposition or to testify at the hearing.

5. Prior to the arbitration hearing, Mendez had received from Commercial Credit an evaluation for Kathy Smith showing a "needs improvement" rating. Mendez was also aware that Commercial Credit did not believe an evaluation existed for Bill Stroupe and did not produce one, and that Commercial Credit had been unable to locate a time sheet for Bonni Schandelwin. Further, Mendez was aware that Commercial Credit would call Jerry Gildea as a witness and offer as exhibits evaluations for Kathy Smith and Wanda Shockey.

6. On December 11, 1997, a hearing was held before three arbitrators from the American Arbitration Association in Santa Fe, New Mexico.

7. In presenting his case, Mendez was his only live witness. He also presented the deposition testimony of Bill Stroupe, Paul LaRue and Albert Anglada.

8. Bill Stroupe's deposition testimony stated that he had in fact been given a "needs improvement" evaluation, like

Mendez, even though Commercial Credit had not produced the evaluation. Commercial Credit did not submit any evidence refuting Stroupe's testimony.

9. Mendez's attorney instructed him to limit his testimony in certain areas.

10. Mendez submitted four affidavits as additional evidence. The arbitrators took these affidavits under consideration but ultimately chose not to admit the affidavits into evidence because they contained hearsay and Commercial Credit had not been given an opportunity to cross-examine the declarants.

11. At the hearing, Mendez did not offer any evidence regarding Kathy Smith's second, "needs improvement" evaluation nor any evidence on the missing time sheet of Bonni Schandelwin though he had documents on both issues in his possession.

12. The arbitrators issued their decision denying Mendez's grievance and denying Mendez any damages on January 9, 1998. Three days later, Mendez sent a letter to the American Arbitration Association appealing the arbitrators' decision. Mendez was notified by letter dated February 13, 1998, that the American Arbitration Association denied his motion for reconsideration other than to correct a clerical error contained in the original award letter.

13. On March 3, 1998, Mendez filed a petition in New Mexico State Court, seeking an order vacating the arbitrators' decision and granting a rehearing before a new panel of

arbitrators. Commercial Credit removed the action to this Court on March 25, 1998.

14. Commercial Credit is a consumer loan company engaged in interstate commerce.

STANDARD OF REVIEW

Summary judgment is an integral part of the Federal Rules of Civil Procedure, which are intended to " 'secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed.R.Civ.P. 1). Under Rule 56(c), summary judgment is appropriate when the court, viewing the record in the light most favorable to the non-moving party, determines that "there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law." *Thrasher v. B&B Chemical Co.*, 2 F.3d 995, 996 (10th Cir. 1993).

The movant bears the initial burden of showing "there is an absence of evidence to support the nonmoving party's case." *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). Once the movant meets this burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

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Although the material submitted by the parties in support of and in opposition to the motion must be construed liberally in favor of the party opposing the motion, *Harsha v. United States*, 590 F.2d 884, 887 (10th Cir. 1979), the burden on the moving party may be discharged by demonstrating to the district court that there is an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 325. In such a situation, the moving party is entitled to judgment as a matter of law, "because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* at 322.

ANALYSIS

Because Commercial Credit is involved in interstate commerce and because the arbitration in this case proceeded as part of a settlement between citizens of different states, the Federal Arbitration Act, 9 U.S.C. § 10, governs the validity of the arbitration award. *Foster v. Turley*, 808 F.2d 38, 40 (10th Cir. 1986); *see also Roberson v. Money Tree of Alabama, Inc.*, 954 F.Supp. 1519 (MD. Ala. 1997); *New Castle County v. Fire Ins. Co.*, 728 F.Supp. 319, 320 (D. Del. 1989).

Judicial review of arbitration awards under the FAA is "among the narrowest known to law." *Litvak Packing Co. v. UFCW, Local 7*, 886 F.2d 275, 276 (10th Cir. 1989). "[M]aximum deference is owed to the arbitrator's decision." *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995). The courts will not entertain a collateral attack on the arbitration award: factual disputes or disputes about

the weight of the evidence are not open to review in the federal courts. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36-38 (1987); *Foster*, 808 F.2d at 40.

The FAA provides that an arbitration award maybe vacated by the district court only in the following circumstances:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10. The party challenging the award bears the burden of proving one of the enumerated grounds for vacating the award by clear and convincing evidence. *Foster*, 808 F.2d at 42; *Ormsbee Dev. Co. v. Grace*, 668 F.2d 1140, 1147 (10th Cir. 1982).

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In the present case, Commercial Credit correctly points out that Mendez invests considerable effort in arguing the merit of his discrimination claim rather than attacking the validity of the arbitration agreement. The only issue properly before this Court in this case is the validity of the arbitration award. To the extent that Mendez asks this Court to review the factual determinations, credibility assessments and weight given to the evidence by the arbitrators, this Court must decline the request. *Litvak Packing Co.*, 886 F.2d at 276.

Construing the pleadings liberally in favor of this *pro se* litigant, Mendez asserts that the arbitration award must be set aside because (1) the arbitrators refused to admit his proffered affidavits into evidence, and (2) Commercial Credit presented fraudulent testimony. Respondent is correct that Mendez has not presented sufficient evidence of either of these claims to support setting aside the arbitration award.

As to the proffered affidavits, under the Arbitration Policy which governed these proceedings, the arbitrators could consider evidence submitted by affidavit but were not required to. The arbitrators did in fact take Mendez's affidavits under advisement and ultimately declined to admit them because they contained hearsay and Commercial Credit objected that it did not have an opportunity to cross-examine the declarants. This decision was well within the discretion of the arbitrators and does not evidence partiality, an excess of power, misconduct or "any other misbehavior" which prejudiced Mendez's rights. *See Barker v. Government Employees Ins. Co.*, 339 F.Supp. 1064, 1067 (D.D.C. 1972). Mendez was free to call the witnesses to the stand and to

request a continuance if he needed time to secure their attendance. He did not do either. Thus, the arbitrators' decision not to admit the affidavits does not warrant setting aside the arbitration award.

Next, Mendez repeatedly accuses Commercial Credit of submitting fraudulent testimony at the arbitration hearing. Specifically, Mendez asserts that: (1) Jerry Gildea lied about restrictions on Kathy Smith's work; (2) Jerry Gildea lied about the extent of Wanda Schockey's medical leave; (3) Commercial Credit withheld Bill Stroupe's negative evaluation; (4) Commercial Credit "forged" a negative "needs improvement" evaluation for Kathy Smith; and (5) Commercial Credit made false statements regarding Bonni Schandelwein's time sheet. Mendez, however, has simply failed to prove any of these allegations or to demonstrate what bearing they had on the arbitration award.

Further, viewing the record in the light most favorable to Mendez, Commercial Credit has successfully demonstrated that the evidence was truthful, that the alleged falsity was known to Mendez at the time of the hearing, or that the alleged falsity was irrelevant in the arbitration case. Specifically, Commercial Credit has demonstrated the following:

(1) Mendez testified in his deposition that Gildea's testimony regarding Smith's work was in fact accurate.

(2) The arbitration board had Schockey's leave records before it and thus could assess for itself the validity of Gildea's testimony on this point.

(3) The only testimony before the arbitration board regarding Stroupe's evaluation was Stroupe's own deposition testimony that he had received a negative evaluation. Commercial Credit presented no evidence refuting or denying the existence of the evaluation.

(4) Mendez had in his possession the allegedly "forged" evaluation for Kathy Smith. He did not seek to admit the document into evidence at the hearing or to otherwise raise the issue.

(5) Mendez had in his possession all of Bonni Schandelwein's employment records. He did not seek to admit these documents into evidence at the hearing or to otherwise raise the issue.

In sum, Mendez had an opportunity to fully address all of these issues at the arbitration hearing. See *Foster*, 808 F.2d at 42; *O'Rear v. American Family Life Assur. Co.*, 817 F.Supp. 113, 115 (M.D. Fla. 1993). Mendez was aware of all of these alleged falsities, had an opportunity to cross-examine all of Commercial Credit's witnesses, had in his possession all of the documents he asserts prove Commercial Credit's fraud, and had the opportunity to present testimony from all of his witnesses, either in person or by deposition. The fact that Mendez and his attorney chose not to take advantage of these opportunities is not grounds for now attacking the validity of the arbitration award.

Because Mendez has failed to present sufficient evidence to permit a reasonable jury to find on his behalf and set aside the arbitration award, Defendant is entitled to judgment as a matter of law. See *Foster*, 808 F.2d at 42.

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CONCLUSION

IT IS THEREFORE ORDERED that Respondent's Motion for Summary Judgment **[Doc. No. 21]** is hereby **GRANTED** and Applicant's motion for summary judgment in his uncaptioned pleading **[Doc. No. 17]** is hereby **DENIED**. The Complaint is hereby **DISMISSED WITH PREJUDICE**.

s/ Martha Vazquez
MARTHA VAZQUEZ
UNITED STATES DISTRICT
JUDGE

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 98-0358 MV/LFG

RAYMOND F. MENDEZ,

Applicant,

v.

COMMERCIAL CREDIT CORPORATION,

Respondent.

JUDGMENT

The Court, having granted Respondent's Motion for Summary Judgment by Memorandum Opinion and Order entered contemporaneously with this Judgment,

IT IS HEREBY ORDERED that judgment is entered in favor of Respondent and against Applicant, and this action is hereby dismissed **with prejudice**.

s/ Martha Vazquez
MARTHA VAZQUEZ
UNITED STATES DISTRICT
JUDGE

APPENDIX C — AWARD OF ARBITRATORS OF THE AMERICAN ARBITRATION ASSOCIATION DATED JANUARY 9, 1998

American Arbitration Association
Dispute Resolution Services Worldwide

EMPLOYMENT DISPUTE ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Raymond F. Mendez

Claimant,

– and –

Commercial Credit Corporation

Respondent,

Case Number 76-160-0093-97

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, had having been duly sworn and having duly heard the proofs and allegations of the Parties, FIND as follows:

A hearing was held in Santa Fe, New Mexico on December 11, 1997 in the above captioned matter. The Arbitrators were Douglas Grimwood and Gerard Morales of

Phoenix, Arizona and Anne Thomas of Albuquerque, New Mexico. Ann Yalman of Santa Fe, New Mexico Fe represented the Claimant and Tom Stahl of Santa Fe, New Mexico Fe represented the Respondent. The Claimant, Ray Mendez was present. The representative of Commercial Credit Corporation was Dave Roberts.

The Claimant, Ray Mendez has been actively involved in the credit industry in New Mexico since 1967. He started work with SIC Credit Company in 1967 in the area of past due accounts in its Las Vegas, New Mexico office. Over the course of time, he was promoted to Branch Manager in the Santa Fe office.

In 1980, Barclay's purchased SIC's business and Mr. Mendez went to work for a short period for Beneficial Finance. He soon returned to Barclay's as a Branch Manager in Santa Fe. In that position, he supervised two full time employees and one part time employee. While employed at Barclay's, Mr. Mendez enjoyed a great deal of success. He had one of the lowest delinquency rates in the Country. He had one of the lowest rates of customers who would pay off their loans in order to obtain financing elsewhere. On one occasion, he was made Manager of the Year. He won a trip to Puerto Rico in conjunction with that honor.

In 1990, Commercial Credit Corporation ("CCC") purchased Barclay's offices in New Mexico, including the office in Santa Fe. CCC already had an office in Santa Fe. Bonnie Schandelwein was the Manager of the other CCC Santa Fe office. CCC consolidated the office, and made Ms. Schandelwein a subordinate of Mr. Mendez. Ms.

Schandelwein is a woman in her 30's. Mr. Mendez was in his late 40's at the time of the consolidation.

According to Mr. Mendez, the primary jobs of the Branch Manager were to hire personnel, train personnel, exercise "credit judgment" with respect to the loans which were issued, utilize "charge off control", and bring in new loan business. Upper management at CCC established goals for each of the Branches and set the interest rates that could be charged for their loans. Branch Managers retained discretion on the "mix" of the loans between real estate and personal loans. Because the Santa Fe market was "hot" in the early 90's, Mr. Mendez placed a somewhat higher percentage of his loans in real estate than other Branches did.

The lending market in Santa Fe was highly competitive. Finance companies such as CCC had to compete against mortgage brokers who are often permitted to offer borrowers lower rates of interest. Mr. Mendez testified that this competition was accentuated by the fact that CCC management wanted to attract the most credit worthy borrowers while charging them an interest rate normally paid by the least credit worthy borrowers. He testified that this placed him in a difficult position.

Mr. Mendez testified that the first year or two after the acquisition, he was able to get along well with his supervisors at CCC. For 1990, he did receive a "needs improvement" but he testified he was not overly concerned about this as the rest of his performance and development review indicated he was doing relatively well. (Exhibit 1).

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For 1991, Mr. Mendez improved in a variety of areas and received an "achieving expectations". (Exhibit 2). For 1992, Mr. Mendez received an "achieving expectations", with the notation that the dropping real estate market hurt Mr. Mendez' profit margins. (Exhibit 3).

Beginning in 1993, and continuing throughout the remainder of his employment, Mr. Mendez stated that the way in which his supervisor treated him and other Company management began to change. Mr. Mendez said that he met with Mr. Willemstad, the President of CCC. Mr. Willemstad said he and Mr. Mendez should "throw away his delinquency plaques", of which Mr. Mendez had been quite proud. Mr. Willemstad said that the emphasis was going to be different than it was at Barclay's, and that his success would not depend solely or largely on the delinquency rate.

Mr. Mendez also reported that shortly after the acquisition by CCC, Larry Falin, his supervisor, noted that some Barclay managers made too much money. It is uncontested that the pay ranges for CCC were substantially lower than the pay ranges for Barclay's, and that a Branch Manager for CCC could earn compensation comparable to a Barclay's manager but only with the use of the substantial incentive program that CCC had.

CCC grouped Branches on the basis of size, dollar volume and geographical area. Branches in a group competed against one another in the area of profitability. In his 1993 evaluation, Mr. Mendez' review indicates that the Santa Fe Branch was 22 out of the 28 Branches in his group in achieving the goals established by management. This placed them in the lowest quartile of his group.

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In 1993, Mr. Mendez began to receive insulting faxes from his supervisor, Larry Falin. On a day in which no loans were placed, Mr. Falin would fax to the Santa Fe office a piece of correspondence of business reports with the handwritten notations "is your office open?", "if your employees are not going to give 100%, give them the day off so they can get another job." He also received faxes that included marginal notations of profanities and vulgarities. When Mr. Mendez' delinquency rate rose slightly, he received a notation indicating that he should call "Call Farmington. They'll show you how to do it", even though historically Mr. Mendez' delinquency rate had been a fraction of the delinquency rate in Farmington.

While Mr. Mendez was experiencing these pressures, management at CCC determined that the Santa Fe branch no longer needed a part time employee. The loss of the part time employee resulted in the resignation of Angie Tapia, one of Mr. Mendez' long-time and trusted subordinates. Mr. Mendez brought this immediately to the attention of Dave Roberts by sending him a copy of Ms. Tapia's resignation. In her resignation, Ms. Tapia attributes the loss of the part timer as being one of the reasons she is resigning. (Exhibit 5).

Mr. Roberts immediately responded that the ratio of employees per open file indicated that no part time employee was needed and that Mr. Mendez should do a better job of organizing his office. (Exhibit 6).

Thereafter, Mr. Roberts sent Mr. Mendez a more detailed memorandum, again stating that no part time employees were

necessary based on the statistics of his office, and that if Ray, Bonnie Schandelwein and Angie Tapia would look at their work more objectively, they could obtain better results. (Exhibit 7).

In conjunction with these pieces of correspondence, Mr. Mendez told Mr. Falin that Angie Tapia was going to resign and "I'll probably be the next to go".

Thereafter, Mr. Mendez had a telephone conversation with Mr. Roberts, who was Mr. Falin's supervisor. Mr. Roberts was quite concerned about what he perceived to be a threat to resign if he could not have the part time employee. Mr. Roberts told Mr. Mendez that he should not threaten to quit over not having a part timer and that if he wanted to resign or threaten to resign, he should put it in writing. Mr. Mendez testified that he interpreted Mr. Robert's remarks to be a demand for a written resignation. Mr. Mendez testified that he had never been fired from a job but was beginning to feel quite insecure in his job at CCC. He called the management at Enchantment Mortgage that had as its owner one of his former subordinates. Thereafter, Enchantment Mortgage offered Mr. Mendez a position. The base pay at the position of Enchantment Mortgage was comparable of that of CCC, but no bonus or benefits were available.

By letter dated July 8, 1994, Mr. Mendez resigned his employment with CCC. (Exhibit 8).

In conjunction with the resignation, Mr. Mendez filed a grievance concerning his "needs improvement" review. (Exhibit 9).

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The grievance was appropriately processed and the matter is properly before the Arbitrators.

The issues to be resolved by the Arbitrators are as follows:

1. Was Mr. Mendez subjected to discrimination based on his age?

Mr. Mendez contends that the harsh language contained in some of Mr. Falin's faxes to him constituted discriminatory treatment on the basis of his age. Mr. Mendez could not produce any evidence at all that other Branch Managers who were younger than Mr. Mendez did not receive such faxes from Mr. Falin. Moreover, it is apparent that Mr. Falin and Mr. Roberts were attempting to motivate Mr. Mendez and his staff to produce higher numbers as far as their productivity was concerned. In our opinion, the problem was not that CCC had determined that Mr. Mendez was "too old" and could not perform his job. On the contrary, CCC was apparently of the belief that Mr. Mendez could perform his job and was simply failing to do so. For example, in his final evaluation, Mr. Falin was quite complimentary of Mr. Mendez' abilities:

"(a) Excellent job knowledge but sometimes let his strong self-opinions effect what's best for the Branch;

(b) perfectionist;

(c) good coach-teacher-employees always are knowledgeable in all areas of operations."

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In Mr. Robert's memorandum to Mr. Mendez, Mr. Roberts states his confidence that Mr. Mendez and his staff *can* perform the work which needs to be done. He states in pertinent part:

> "You, Bonnie, and Angie are capable individuals with "good" heads for the business.
>
> "As I suggested, you must back from the operation and look at it *objectively* asking the questions 'what are we doing that could be done differently and be more efficient?' And 'can we eliminate any of these steps and still get the job done properly?' " (emphasis added)

Mr. Mendez contends that other Barclay's alumni working for CCC were driven out of their jobs because of their age. The only evidence to support this contention was deposition testimony from Mr. Strupe and Paul LaRue. Mr. Strupe acknowledged the receipt of the caustic faxes but acknowledged that other Branch Managers got them too. (Depo. Of Strupe, pp. 10-11). Mr. Strupe said that Mr. Falin did not verbally abuse him in one on one conversation and if profanity was used in group meetings, it was not directed against him. Strupe testified that he felt Mr. Falin respected him for his experience and did not swear at him for that reason. (Tr. 10). Mr. Strupe further testified that Mr. Falin told *groups* of people that if they could not do the job, they could be replaced. Apparently, this was a theme frequently repeated by the CCC management to all its personnel: "Make the numbers or get out".

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Mr. Strupe testified in his deposition that CCC expected Managers to work until they drop and then get up and do it again. (Tr. 17). Strupe testified that he had worked 60 hours per week for Barclay's and was now working 80 hours per week for CCC and just barely making his goals. In our view, a fair reading of Mr. Strupe's deposition is that the work load imposed by CCC on its Branch Managers was substantially greater that that imposed by Barclay's and that Branch Managers, young or old, who could not make their production figures were invited to leave.

Paul LaRue testified in a similar manner. Although he is approximately Mr. Mendez' age, he testified that most of the faxes he received were polite. (Deposition testimony of Paul LaRue, Tr. 11). Mr. LaRue testified that he left CCC approximately ten months after the acquisition of the Barclay branches by CCC. Mr. LaRue testified that one of the reasons that he was told to resign or be fired was that he kept calling Corporate Headquarters in Baltimore for approval on relatively routine loan applications (Tr. 10) and that he argued with his supervisor (Tr. 13). He also said that the fact that he used to work at Barclay's was, in his opinion, a factor in his being asked to resign. (Tr. 12). He does not elaborate on the reason for CCC's purported animus against former Barclay employees, nor does he provide any evidence to support that belief.

Mr. Mendez contends that the evaluation for 1993 indicating that he "needs improvement" was discriminatory. First, it is undisputed that Mr. Mendez was 22 out of the 28 Branches in his group. There is no contention that these rankings were inaccurate, that the statistics upon which the

evaluation is based were false or manufactured, or that Mr. Mendez actually ranked higher than 22 out of 28 in his group. Second, given the intensively competitive nature of the Santa Fe credit market, the repeated admonitions to Mr. Mendez is his annual reports to market personal loans more aggressively and to participate in that marketing personally, and in his Branch's overall performance when compared to Branches of similar size in the geographical area, it is apparent that Mr. Mendez and his Branch did "need improvement". The great weight of the evidence indicates to us that CCC did not believe that Mr. Mendez was failing to meet his objectives due to his age. The frustration of CCC management was that Mr. Mendez was fully capable of doing better but was failing to do so because of factors that were personal to him. This included his attitude toward the loan mix and the way that the office operated.

Mr. Mendez presented no evidence that the Company's determination that the evaluation of "needs improvement" was false.

Even if Mr. Mendez had produced evidence that the classification of "needs improvement" was inaccurate; he would have the further burden of showing that the reason for the inaccuracy was to establish a pretext for age discrimination. To that end, Mr. Mendez offers the 1994 evaluation for several other Branch Managers who also scored in the lowest 25% but did not get a "needs improvement". These included Wanda Shockey, Jim Byrd and Cathy Smith. (Exhibits 17, 18 and 19). Mr. Jerry Gildea testified credibly that Ms. Smith's situation was not comparable because she spent a substantial party of 1993 on

short-term disability. He testified that Mr. Byrd's situation was not comparable because he spent only six months in a management position and it was his first opportunity to manage a Branch. Mr. Gildea testified that Cathy Smith's situation was not comparable because the Branch was located near the border between New Mexico and Texas and that she was deprived of the opportunity to loan in Texas for a substantial part of 1993. We find Mr. Gildea's testimony in this regard very credible. We find that Mr. Mendez failed to demonstrate any evidence of age discrimination on the part of CCC.

2. Did CCC retaliate against Mr. Mendez for filing a charge with the EEA?

Mr. Mendez claims that CCC retaliated against him by permitting his successor to offer loans at lower interest rates to keep Mr. Mendez from luring those customers to Enchantment, his new employer. The testimony is clear that Mr. Mendez utilized the information that he had obtained about the individual customers in the course of his employment at CCC to convince them to refinance with his new employer at Enchantment. In the context of the highly competitive lending market in Santa Fe, it seems a natural reaction for a lender such as CCC to take appropriate steps to retain customers under such circumstances. The only specific example provided by Mr. Mendez is the case of Albert Anglada. Mr. Anglada's testimony was that he was quite pleased that he was able to negotiate with CCC to lower his interest rates to the same rate being offered by Enchantment. (Tr. 11). It seems much more likely to us that CCC's decision to permit Mr. Mendez' successor to negotiate

with current customers to retain their business in the face of Mr. Mendez' competitive advantage was only common business practice and that this was much more likely the motivating factor in the decision than the fact that Mr. Mendez had filed a charge with the EEOC alleging age discrimination.

Accordingly, we AWARD as follows:

Based on the foregoing, we, the undersigned Arbitrators, conclude that the Grievance in this matter should be, and hereby is, DENIED.

The fees and expenses are awarded in accordance with the allocation of fees and expenses under §24 of the Primerica Employment Arbitration Policy, which provides as follows:

24. EXPENSES

> "In order to make available to its employees these arbitration procedures, Primerica or its Affiliate shall pay 100 percent in excess of twenty-five dollars ($25) of any administrative fee required by the AAA if an employee or former employee files under these procedures. The expenses of witnesses for either side shall be paid by the party requiring the presence of such witnesses. Each side shall pay its own legal fees and expenses. All other expenses (except Postponement Fees or Additional

> Hearing Fees) of the arbitration, such as required travel and other expenses of the arbitrator (including any witness produced at the direction of the arbitrator), and the expenses of a representative of AAA, if any, shall be paid completely by Primerica and Affiliates. If the arbitration proceeding continues more than one day, the incremental expenses of the additional days shall be borne equally by the parties. This allocation of expenses may not be disturbed by the arbitration award.

The fees and expenses of the American Arbitration Association totaling One Thousand Nine Hundred Eighteen Dollars and No Cents ($1,918.00) shall be borne by Respondent with the exception of Twenty-Five Dollars and No Cents ($25.00) which shall be borne by Claimant. Therefore, Claimant shall pay to Respondent the sum of Twenty-Five Dollars and No Cents ($25.00) for that share of fees and expenses previously advanced by Respondent to the Association.

The compensation of the neutral arbitrators totaling Four Thousand Three Hundred Fifty Dollars and Forty-Eight Cents ($4350.48) shall be borne by Respondent.

This award is in full settlement of all claims and counterclaims submitted to this arbitration.

Appendix C

DATED this 9th day of January, 1998.

s/ N. Douglas Grimwood
N. Douglas Grimwood, Esq.
Presiding Arbitrator

s/ Anne Thomas
Anne Thomas
Arbitrator

s/ Gerard Morales
Gerard Morales
Arbitrator

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 16, 1999

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-2323

RAYMOND F. MENDEZ,

Plaintiff – Appellant,

v.

COMMERCIAL CREDIT CORPORATION,

Defendant – Appellee.

ORDER

Filed September 16, 1999

Before **PORFILIO, BARRETT,** and **HENRY,** Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ Patrick Wyman
Deputy Clerk